No. 80-1140

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARK J. THOMAS

BETRA MANUFACTURING COMPANY
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER IN REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

MARK J. THOMAS
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OWNER

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QUESTIONS PRESENTED

What is the value of the due process clause of the United States Constitution, Fifth Amendment guaranteeing a fair trial? Is due process denied if the judges of a Federal Appellate Court disregard the ethical principles behind the American Bar Association Canons of Judicial Conduct for Federal Judges by not taking appropriate action against a federal agency admitting in oral hearing before the Appeals Court their prosecution of the respondent was based on a fraudulent document submitted by the charging party?

Is a fair trial not further denied if the Administrative Law Judge made pretrial ex parte communication with the agency, denied my witnesses, and acted as an advocate of the agency during the trial; the N.L.R.B. Board condoning this action by stating no injustice was done?

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CONSTITUTION

U. S. Constitution, 5th Amendment. 5, 8, 9 16

STATUTE

National Labor Relations Act, 29 U.S.C. 151 et seq.:. 6

MISCELLANEOUS

The Federalist, No. 83, Hamilton . . . 8

(Continued)

What is the value of a Constitutional clause that dictates fairness in a court of law if not one of the twenty-plus judges of the Ninth Circuit Court of Appeal when presented with our Petition for Rehearing outlining gross improprieties does not feel the ethics of his profession strongly enough to request a vote on the suggestion for a rehearing en banc?

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ORDER Filed September 15, 1980, U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion that Hearing be en Banc. Not reported

MEMORANDUM Filed July 21, 1980 U.S. Court of Appeals for the Ninth Circuit On Application for Enforcement of an Order of the N.L.R.B., "Enforcement of the Board's order is GRANTED," at 624 F2d 192 (Table).

DECISION of the N.L.R.B. Dated December 13, 1977. Cited: Betra Mfg. Co. and International Association of Machinists and Aerospace Workers, AFL - CIO, District Lodge 93, Local Lodge 504 1978 NLRB, 18, 828, 233 NLRB No. 156 Case # 32-CA-64, December 13, 1977

JURISDICTIONAL STATEMENT

Jurisdiction of this court is conferred by U.S.C. 28-1254 "Cases in the Court of Appeals may be received by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment.
2. The date of filing of the order to be reviewed is September 15, 1980. This is the order denying Petition for Rehearing and Suggestion that Rehearing be en Banc, U.S. Court of Appeals for the Ninth Circuit.

PROVISIONS OF LAWS INVOLVED IN THE CASE

U.S. Constitution, Fifth Amendment:

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.)

(Section 7). Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT AND ARGUMENT

In reply to the Brief for the N.L.R.B. in Opposition, we point out to this Court the glaring omission in their brief. THERE IS NO REPLY TO THE FIRST QUESTION CONCERNING THE DENIAL OF DUE PROCESS caused by the Board's prosecution of the petition which was instigated from a document which the Board and the General Counsel knew to be false. We can understand the N.L.R.B. side-stepping the issue. They have done this regarding all other contentions of irregularities. They never answer the charges specifically by a detailed or simple explanation. They have always used the "sweep it under the carpet" method by saying in effect we think your fears of injustice are an illusion; none of this has happened.

The one thing anyone in this country expects as a minimum of his Government is a reasonable explanation of the matter. In this case none has ever been offered - not even in the Board's and Solicitor General's Brief in Opposition to Certiorari was there any denial of the charges made by the petitioner or that he had exaggerated instances out of proportion to the actual basis. The tactic is used of simply referring to prior decisions where the N.L.R.B. prevailed. Even in those cases the reasoning involved is not divulged.

Let us consider our charge that the Board's action was taken against us with full knowledge that the Union's charging document was false - a primary accusation of ours which they have always ignored (R1b, 2) and still ignore - even before this Court. I am obliged to assume this omission is because the Board and its General Counsel are accessories after the fact. The N.L.R.B. Regional Office, the General Counsel and his lawyers, the hand-picked A.L.J.s and the adjudicating Board have used all their great powers in combination and probably collusion. (By law they are shielded by a thin screen between them which is often pierced. Congress made this scanty separation to dispel the public's fears that this combined group established under the Act might run afoul of the Constitutional concept of the separation of powers. In this Act, Congress also provided a sham enforcement process which does not allow a full trial by the Judicial Branch.)

It seems the only one connected in opposition to us in this case who has ever proved himself not an accessory was Mr. Lawrence Blatnick - the N.L.R.B. attorney. He exposed the sham at the Appeals Hearing. However, from the Memorandum Decision of the Ninth Circuit, it is obvious that the Panel overlooked this revelation with its obvious implication of criminal activity. He now avoids the issue

again in the Reply Brief; once more becoming an accessory by failing to reveal the truth. Considering his position as an officer of the Court in signing the Reply Brief (as a Government lawyer and employee paid by the public purse) should he uphold his agency in an action he has admitted to be illegal? Or does he not have an obligation to the citizenry to expose an illegal use of power? But I would be willing to forgive him this error because I believe his candor in the Appeals Hearing demonstrated his basic honesty. He spoke out against his powerful employers and by doing so the doors of a regulatory agency's biases and tyrannies are set ajar for greater inquiry within.

It surprises me that the Solicitor General - a scholar in jurisprudence - and by his position the most prestigious lawyer in the land, makes no comment as to my concern for justice at the hands of the Government. The Solicitor General does not even say that he has carefully examined the basis for Mr. Blatnick's revelation and has found it without merit, as the Appeals Court did. I could expect either the "sweep it under the rug treatment" or a careful investigation of the N.L.R.B. Counsel, Mr. Blatnick's declaration. If an investigation was really made, the Justice Department, in protecting the public against deceit in government would then enter a confession of

error (of the N.L.R.B.) and request Certiorari be granted and these abuses be condemned by the Court or explain the reason for Mr. Blatnick's revelation. But no mention of the matter tells me - a layman - that it is possible that by the next Centennial of the U.S. Constitution that we will have reverted to a situation that existed under the British Crown. The citizenry will be once more oppressed by the Government.

The basic idea of the Constitution was to protect the people against the government. One of its monumental concepts was the division of the Federal Government into three separate and distinct branches. There was further protection of the people against the government by granting them the right to a trial by jury when confronted by the government as explained by Hamilton in The Federalist, No. 83. In the light of the constant deterioration of these principles by administrative legal procedures, it seems reasonable to expect that the fledgling Constitution of 1787 will have become a two-hundred year old derelict. For administrative bodies now make regulations with the force of law.

I observe that the young Soviet Constitution and its Bill of Rights molded after ours grants far more rights than our own. From the outside we can see the U.S.S.R's

disingenuousness. In this case can we not see some of our own increasingly pervasive faults from within? The self-willed blindness of mutually supportive elements in the governmental processes leads to an accumulation of tyranny. It is a blindness of mind that in a bureaucracy becomes habit. It is in fact based on a fear of revelation of incompetence. For the ordinary subject of these abuses it is a form of warfare against him and the Constitution. A citizen of this country generally believes in the equation honest courts equal justice. In order for there to be reform it will be necessary for the Supreme Court to face the reality of these abuses in totality.

Having discussed the capriciousness of the N.L.R.B. and the General Counsel, we come to the bias of the A.L.J. not mentioned in the Solicitor General's brief. The ex parte communication of the A.L.J., his denial of witnesses, and advocacy of the N.L.R.B. are inexcusable biases. For an excellent discussion of bias we refer to N.L.R.B. v. Phelps, et al, 136 F2d, 562, 563 (5th cir. 1943). "* * * A fair trial by an unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done by a judge. Indeed

if there is any difference the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." See also Inland Steel Co. v. NLRB, 109 F2d 9, 20-21 (7th Cir. 1940).

The respondent should expect the Board to act as a check on the possibility of a biased or capricious A.L.J. and examine any accusations to that effect with much attentiveness. But * * * "The Board brushed aside with the bare statement that it had reached the conclusion that there was neither bias or prejudice on the part of the examiner which affected the fairness of the hearing to the respondents." (supra, NLRB v. Phelps p. 567).

To quote from our Respondent's Brief to the Ninth Circuit Court, p. 9, "It is a fact of common experience that evidence from testimony establishes credibility primarily, as demeanor judgments in themselves are likely to be inaccurate, and indeed simply prejudiced. 'Findings cannot be said to have been fairly reached unless material evidence

which might impeach, as well as that which will support its findings is heard and weighed.' NLRB v. Indiana Michigan Electric Co., 318 U.S. 405, 1943 405. In this case the error of the A.L.J. in prohibiting the crucial testimony of witnesses led him to improperly discredit my testimony. 'However our respect is not justified where, as here, the examiner has contributed to a witness' lack of credibility by improperly restricting his testimony.' NLRB v. Koppel Co. 412 F2d, 681 (3rd Cir. 1969). Similarly, see also NLRB v. Process and Pollution Control Co. 588 F2d, 786, 789 (10th Cir. 1978).

As the A.L.J. erred in this case on the negative side in restricting testimony he erred on the aggressive side in assuming a prosecutorial role. 'Once the A.L.J. undertook the General Counsel's prosecutorial function by ferreting out evidence of uncharged violations and building a case against the defendant-employer, he overstepped the permissible scope of his duties,' NLRB v. Tamper, Inc., 522, F2d, 781 790 (1975). See also Tele-Trip Co. v. NLRB, 340 F2d, 575, 581 (4th Cir. 1965)

Bias is fundamental, not secondary to perverting all findings of any judge. Here we have recourse again to the eloquence of Judge Hutcheson on the Fifth Circuit in

NLRB v. Phelps, * * * ' for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.' (supra NLRB v. Phelps, 564.)."

In view of the revelation of the N.L.R.B. attorney of a fraudulent charge, is it not true that bias charges apply to all the other Government participants in this case?

This case was decided on the credibility given the one Government witness by the A.L.J. This witness was the one who refused to bargain at the Jan. 19 meeting. In our cross-examination pressing this matter, he would not declare that this was the case. (TR.208-213.) Then in the Appeals Court the N.L.R.B. reveals that my contention brought forth in our declaration made to the field examiner was true and the union refused to bargain at the Jan. 19 meeting. (R1b, p. 1-5).

How can any conviction stand when the prosecuting party (the N.L.R.B.) admits their witnesses had made false declarations at the trial? (Petition for Rehearing before Appellate Court, page 2)

In their brief in opposition , the Solicitor General inaccurately described the Union charge (page 3). They say that the Union charge alleges the Company had refused to bargain in good faith. THIS IS NOT TRUE. As far as the unfair bargaining charge goes, the Union's charge (though admitted false by the N.L.R.B.) read precisely as one of refusing to bargain (not of bargaining in bad faith). The unfair bargaining idea is then added by the pro-union (not pro-employee) regional office. The regional office knows the biased machinery working for them; the chances for victory were about one-hundred out of one-hundred with the A.L.J., especially when the matter was discussed before the trial, and one-thousand percent with the Board. In the Appeals Court it was not a question of perfect batting, but the N.L.R.B. achieves excellent results because of the Court's willingness to often bow to the Board's expertise. This saves much time in reducing the work load of the Appellate Judges. The N.L.R.B. is responsible for a lot of this load.

We wonder why the N.L.R.B. and the Solicitor General do not display more candor in dealing with this Court? Do they think justice is served by not disclosing fully matters which petitioners confront them with in this Court?

CONCLUSION

The Legislature entrusted the N.L.R.B. with great powers in the field of labor and management relations. The Board has the power to interpret the Statute, thus making new law by precedent. They also have the power to judge the transgressors of the Act. The General Counsel has the power to investigate and prosecute. These powers are so great that the possibility of bias must at all times be guarded against. These powers were no doubt given by Congress in the confidence that they would not be abused as they control matters which concern so many of the people. The General Counsel and Board share the same premises, they consult back and forth concerning cases and prosecutions. So where is the separation of powers? The San Francisco Regional Office, which instigated this case shares the same building with the A.L.J.s. In our case it is a fact that the A.L.J. consulted with the Board's people before the hearing.

Correction of governmental abuses was not forthcoming from our plea to the Board for a full hearing and investigation of their Regional Office's tactics in this case. Subsequently an Appeals Court turned a deaf ear on the Government Attorney's revelation of the false charge. The only remaining source of correction of governmental abuse

lies with this Court. Had the people involved making the decisions below not debased their profession by upholding the falsely based condemnation of the petitioner, the judicial branch of the Government would be spared the hours required to process and consider this petition for Certiorari. If more fair trials, with honest lawyers, prosecutors, and well-reasoned, unbiased decisions were made in the courts of this land, there would be enough confidence created in the courts that appeal would become a rare thing. The savings for the public would be enormous in terms of time, costs, and the agony of delay. Legal recourse to the top levels of the court system by the appellate process would be rare and most cases appealed would be of real merit deserving the attention that less harried judges could give them. Judges would have the opportunity to write decisions that are not ad hoc, but decisions of future value to the judicial system and the citizenry of the nation.

We ask the Court to show that it will not tolerate "sloppiness" in the workings of the Courts below. Lack of primary professional work in the Judge's decision, the prosecutor or defense attorney's pleading on the subject matter of a case cannot be accepted. Also honesty and courtesy of all participants

is required. If this were done now, perhaps in the six years before the next centennial of the Constitution, we might achieve a fairness in the Government and courts that was only dreamed of by the Founding Fathers.

We pray that Certiorari be granted in spite of the Solicitor General's opposition. As I sincerely believe that the type of chicanery here revealed in Government can only be eliminated by a strong stand against it with a decision from the bench of the highest court. The people should not be deprived of justice and fairness at the base.

Respectively and sincerely submitted,

Mark J. Thomas, Petitioner

March 14, 1981

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years of age, a resident of Santa Clara County, and not a party to the within action. My business address is 50 Bellevue Avenue, San Jose, California, 95110. I served three copies of the attached Brief for Petitioner in Reply to Brief for the National Labor Relations Board in Opposition by placing said copies in an envelope which was then sealed and postage fully prepaid thereon, and was, on March 16, 1981 deposited in the United States Post Office, 105 N. First Street, San Jose, California, to the following persons:

William A. Lubbers,
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

All persons required to be served have been served.

That there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 16, 1981
March 16, 1981

Suzanne D. Thomas